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No. 06-614

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ERIC RUBIN-SCHNEIDERMAN,

Petitioner,

—against—

MERIT BEHAVIORAL CARE CORPORATION, SATI AHLUWALIA, M.D. and EMPIRE BLUE CROSS AND BLUE SHIELD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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I

RESPONDENTS' BRIEFS DEMONSTRATE WHY CERTIORARI SHOULD BE GRANTED

This Reply Brief is submitted by Petitioner Eric Rubin-Schneiderman in response to new points raised in the briefs of Respondents Merit and Empire. The Reply refutes three points:

1. The argument by both Respondents that when Eric Rubin-Schneiderman was denied in-patient care he was obligated to immediately institute a Federal injunction lawsuit under ERISA § 502(a)(1)(B) [Merit brief Point I E (p.16); Empire brief Points II A (p.8) and II C (p.17)].

2. Respondents' overstatements of the *stare decisis* effect of the *Mertens* decision [Merit brief Points I A (p.7) and I B (p.8); Empire brief Points I (p.7) and II D (p.21) and II E (p.26)].

3. Merit's inaccurate statement concerning the lower courts ruling on the defense of bankruptcy discharge [Merit brief Point III (p.20)].

Neither Respondent disputes the accuracy of Petitioner's research discovery that a fundamental premise of Equity Jurisprudence – going back at least to 1737 – was that "a Man is bound in Equity not only to perform his Engagements, but also to repair all the Damages that accrue naturally from the Breach of them." (Petitioner, p. 15)

POINT I

LIMITING BENEFICIARIES TO DISTRICT COURT INJUNCTION ACTIONS UNDER ERISA § 502(a)(1)(B) IN ORDER TO OBTAIN PRESCRIBED MEDICAL TREATMENT IS A PUNITIVE AND WHOLLY UNREALISTIC OPTION

Merit's and Empire's argument that young Eric Rubin-Schneiderman should have engaged attorneys to prepare and file a Federal Court injunction action when Merit denied him in-patient care for his mental health condition is totally unrealistic. Such an injunction proceeding is neither an adequate nor available remedy on these facts. Any experienced member of the New York bar is well aware of the cost of engaging litigators in that City, particularly for a case involving motions and briefs in a novel and complex area of the law, not to mention the delays inherent in the process. The zeal and determination of Merit's and Empire's counsel in their opposition to the beneficiary's claim in this very case is proof of what a beneficiary could expect in an injunction proceeding under Section 502(a)(1)(B).

A realistic initial retainer for qualified counsel to seek a Federal Court preliminary and final injunction, plus the inevitable appeal if the injunction is granted, is probably at least $25,000 or $50,000. These are not services provided by the Legal Aid Society, and certainly not a task for a *pro se* litigant, particularly one suffering from a debilitating psychiatric illness.

Judge Becker's concurring opinion in *DiFelice v. Doe*, 346 F.3d 442,459 (3d Cir., 2003) puts the injunction option in perspective:

> [P]recious few lawyers would be willing to undertake a horrendously complex cast of uncertain outcome when the greatest potential reward is merely provision of the care that had been contractually promised. Without contingency fees, participants in the midst of medical crises are completely at the mercy of HMOs unless they are fortunate enough to have the financial means to bring a suit for an injunction, a circumstance which is no doubt exceptional. Although it might seem a simple matter to seek an injunction compelling contractually-guaranteed coverage of a procedure, nothing is further from the truth where – as with Mr. DiFelice – the contractual availability of coverage hinges on a highly fact-intensive determination of medical necessity involving accepted standards of care and tolerable levels of risk for the participants' malady.

In its brief, Merit is able to cite only three successful cases brought under § 502(a)(1)(B) (Merit br. p. 17). The facts in those cases are significant – one sought to pre-certify high dosage chemotherapy, another, a bone marrow transplant – life-and-death situations where cost is presumably no object. To suggest that this same high-cost legal proceeding was an available remedy that could and should be used to obtain short-term mental health treatment is naive at best, and the height of cynicism at worst. Congress certainly could not have decided to force beneficiaries to be limited to such a costly and uncertain remedy. Moreover, an injunction action against Merit and Empire would still leave the claim for relief against Dr. Ahluwalia -- herself a fiduciary -- with no remedy other than § 502(a)(3)(B).

POINT II

THE MAJORITY IN *MERTENS* CAREFULLY LIMITED ITS APPLICATION TO A "NONFIDUCIARY ACTUARY"; THE HOLDING HAS NO DIRECT BINDING EFFECT ON CASES LIKE THIS ONE INVOLVING A FIDUCIARY'S VIOLATION OF STATUTORY DUTIES AND OF THE PLAN ITSELF

The majority in *Mertens* limited the applicability of that decision to the case before it, on facts clearly distinguishable from this case. Note how carefully the majority circumscribed the decision in the very opening sentence of its opinion:

> The question presented is whether a *nonfiduciary* who knowingly participates in the breach of a fiduciary duty imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. § 1001 [*250] *et seq.*, is liable for losses that an employee benefit plan suffers as a result of the breach.
>
> (508 U.S. 248 at 249) (Emphasis added.)

In the present case, the defendants are all alleged to be *fiduciaries* under the plan (Complaint pars. 4 and 8, A-11-12). As the *Mertens* majority Court was careful to point out, the facts there were exactly the opposite:

> The Court of Appeals decided that respondent was not a fiduciary, see 948 F.2d at 610, and petitioners do not contest that holding. Lacking equivalent provisions specifying the nonfiduciaries as potential

defendants, or damages as a remedy available against them, petitioners have turned to § 502(a)(3), 29 U.S.C. § 1132(a)(3), which authorizes a plan beneficiary, participant, or fiduciary to bring a civil action:

> "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan."

See also § 502(a)(5), 29 U.S.C. § 1132(a)(5) (providing in similar language, for civil suits by the Secretary based upon violations of ERISA provisions). Petitioners contend that requiring respondent to make the Kaiser plan whole for the losses resulting from its alleged knowing participation in the breach of fiduciary duty by the Kaiser plan's fiduciaries would constitute "other appropriate equitable relief" within the meaning of § 502(a)(3).

We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here. It does not, after all, authorize "appropriate equitable relief" for the purpose of "redress[ing any] violations or...enforc[ing] any provisions" of ERISA or an ERISA plan. No one suggests that any term of the Kaiser plan has been violated, nor would any be enforced by the

> requested judgment. 508 U.S. 248 at 253 (Emphasis added.)

The logical explanation for a difference between holding a *nonfiduciary* and holding a *fiduciary* liable for compensatory damages under § 502(a)(3)(B) was explained by the *Mertens* majority in the final paragraph of the majority opinion:

> The text that we have described is certainly not nonsensical; it allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds. Under traditional trust law, although a beneficiary could obtain damages from third persons for knowing participation in a trustee's breach of fiduciary duties, only the trustee had fiduciary duties. See 1 Scott & Fratcher § 2.5, p. 43. ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, see 29 U.S.C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties – and to damages – under § 409(a). Professional service providers such as actuaries become liable for damages when they cross the line from adviser to fiduciary; must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i) or excise taxes, see 26 U.S.C. §§ 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees. All that

> ERISA has eliminated, on these assumptions, is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves. There is, in other words, a "tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs." *Alessi v Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515, 68L.Ed.2d 402, 101 S.Ct. 1895 (1981); see also *Russell*, 473 U.S. at 148, n. 17. We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.
>
> (508 U.S. 248 at 262) (Emphasis added.)

Note the majority's reservation in the underscored language: "...even if this provision does make money damages available...." Plainly the Court has left the door open for the Court now to hold that money damages are available to a plan beneficiary harmed by a fiduciary's breach of the statute or by violation of the plan. Both of those breaches are alleged in this case. (See Complaint pars. 21-33 A-15-18)

It is also worth noting that when the U.S. Department of Labor raised the possibility of equitable damages in *Aetna v. Davila*, the Supreme Court did not say that possibility was foreclosed by *Mertens* (as both Respondents argue), but instead indicated that the Court's mind is still open on the question:

> The United States, as *amicus*, suggests that some individuals in respondents' positions could possibly receive some form of "make-whole" relief under ERISA §502(a)(3).*** However, after their respective District Courts denied their motions for remand, respondents had the opportunity to amend their complaints to bring expressly a claim under ERISA §502(a). Respondents declined to do so; the District Courts therefore dismissed their complaints with prejudice.*** Respondents have thus chosen not to pursue any ERISA claim, including any claim arising under ERISA §502(a)(3). The scope of this provision, then, is not before us, and we do not address it.
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> (542 U.S. 200, at 221, fn.7.)

POINT III

THE DISTRICT COURT EXPRESSLY REJECTED MERIT'S ARGUMENT ON BANKRUPTCY DISCHARGE; MERIT DID NOT CROSS-APPEAL FROM THAT RULING AND THE ISSUE IS NOT BEFORE THE COURT

Merit states an unfortunate half-truth in its brief (at page 22):

> "Neither the District Court nor the Second Circuit below considered this [bankruptcy discharge] issue in dismissing Petitioner's Complaint."

In fact, Merit's counsel, Mr. Cooperman, expressly raised the bankruptcy issue before Judge Hellerstein in open court on the record, and the Judge rejected it as not a

proper ground for a motion to dismiss under Rule 12(b)(6). Here is the key portion of Mr. Cooperman's argument and the District Judge's ruling as they appear in the transcript of the argument on October 11, 2005:

> MR. COOPERAMAN: Very briefly, your Honor. One other issue, which we brought which is different than ERISA is the fact this case has now been five years. Since that time my client Merit has gone into bankruptcy and this claim specifically has been expunged during the bankruptcy proceedings. There is a Merit entity, but it is black letter law which we cited –
>
> THE COURT: That is also an issue that you will have to raise in an answer. Discharge of bankruptcy is an answer and you have to set it up and I am not reaching that.
>
> MR. COOPERMAN: Very well, your Honor.
>
> THE COURT: I am going [to] decide this purely under ERISA, and whether or not Mr. Seymour has a claim for relief.
>
> MR. COOPERMAN: Thank you, your Honor.
>
> (Transcript, Oct. 11, 2005, pp. 13-15.)

The Judge's ruling was absolutely correct under F.R.Civ.P. Rule 12(b). Merit did not appeal from Judge Hellerstein's ruling and may not raise the point here. If the complaint is reinstated, Merit can plead its bankruptcy discharge defense – which is contested by plaintiff – and it can be dealt with on the merits at that time.

CONCLUSION

We believe this is the first case to reach this Court that squarely presents the question whether § 502(a)(3)(B) permits compensatory damages to a beneficiary as an equitable make-whole remedy for direct fiduciary violations of duties prescribed in the statute and fiduciary violations of the plan itself.

No Supreme Court decision has squarely ruled on the available equitable remedy for such violations – not *Mertens, Great-West, Varity* or *Davila.* If certiorari is granted, this will be the case that first determines that question. It is a federal issue of major importance, determining whether individual employees and their families will be given a fair chance to stand up against health insurers and HMOs who deny them needed medical care in bad faith, when such care is covered by their plans and prescribed by their treating physicians.

That is the compelling reason for granting certiorari in this case.

Respectfully submitted,

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